In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1721

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., et al., *Petitioners,*

vs.

UNITED STATES, et al.

No. 76-1795

ANHEUSER-BUSCH, INC., *Petitioner,*

vs.

UNITED STATES, et al.

No. 76-1870

AMERICAN BAKERS ASSOCIATION, *Petitioner,*

vs.

UNITED STATES, et al.

No. 77-24

THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC., *Petitioner,*

vs.

UNITED STATES, et al.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT BOARD OF TRADE OF THE CITY OF CHICAGO IN OPPOSITION

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BRIEF FOR RESPONDENT BOARD OF TRADE OF THE CITY OF CHICAGO IN OPPOSITION

The Board of Trade of the City of Chicago (Board of Trade) respectfully submits this brief in opposition to the petitions for a writ of certiorari filed by petitioners, The Atchison, Topeka and Santa Fe Railway Company, et al., Anheuser-Busch, Inc., American Bakers Association, and The Board of Trade of Kansas City, Missouri, Inc.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 549 F.2d 1186. It is reproduced as Appendix A to the petition in No. 76-1721 (RR Pet.). The decision and order of the Interstate Commerce Commission affirming and adopting the initial decision of the Administrative Law Judge and the initial decision of the Administrative Law Judge are reproduced as Appendices C and D to the railroad petition.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this court pursuant to 28 U.S.C. §§1254(1) and 2350(a).

QUESTION PRESENTED

Whether the unanimous determinations of the Administrative Law Judge, the Interstate Commerce Commission, and the Court of Appeals for the Eighth Circuit that the railroad rates here involved are unduly discriminatory in violation of section 2 of the Interstate Commerce Act should be further reviewed by this court.

STATUTE INVOLVED

Section 2 of the Interstate Commerce Act, 49 U.S.C. §2, reads as follows:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

STATEMENT OF THE CASE

Foreword

We must respectfully dissent from the petitioners' statements of the case in several respects. These statements, which are highly editorialized, state as facts many things about which there is substantial dispute. The petitioners state as a fact (e.g., RR Pet., p. 4) that the railroads maintain through routes and rates with other railroads, lake vessels, and barges; indeed they base their whole argument on this false assumption. Similar statements appear throughout all the petitions. The Board of Trade strongly disputes such an unfounded assertion. The Court of Appeals found (p. 1191, RR Pet., p. a-10) that whether the ex-barge and ex-lake movements were on through routes was "beside the point", with which the Board of Trade completely agrees. Nevertheless it should not be assumed that the ex-rail, ex-barge, and ex-lake movements are on "through routes", as we shall show in the argument portion of this brief (*infra*, pp. 13-16).

The railroad petitioners also say that the Commission has "held that proportional rates may be limited to through routes". To our knowledge the Commission has

never so held.[1] On the contrary, proportional rates are common where no through routes exist. *Chicago and Wisconsin Points Proportional Rates,* 10 M.C.C. 556, 562 (1938); *Refund Provisions, Lake Cargo Coal,* 299 I.C.C. 659 (1957). In the latter case, in almost exactly the same circumstances as are here presented, the Commission found no through routes, as that term is used in the Act, existed.

The background and nature of the controversy.

This case involves the validity of a report and order of the Interstate Commerce Commission originally made by an administrative law judge and adopted by the Commission as its own. That report found that the proportional or reshipping rates and charges on wheat and wheat products from Chicago, Ill., to the east, maintained by the railroads who were defendants in the action before the Commission (petitioners in No. 76-1721 here), where the prior movement of the commodities to Chicago is by railroad, lake vessel, or barge, without maintaining like rates and charges at the same levels and from and to the same points on the same commodities where the prior movement to Chicago is by for-hire motor carrier, is unjustly discriminatory in contravention of the provisions of section 2 of the Interstate Commerce Act (the Act).[2] The report

[1] No case cited by petitioners so holds. The Commission has never, to our knowledge, defined proportional rates in terms of "routes." The injection of "routes" into petitioners' definition of proportional rates is their own invention. See note 2, below. A through shipment does not necessarily imply a "through route." *Routing Restrictions Over Seatrain Lines,* 296 I.C.C. 767, 775 (1955).

[2] Essential to an understanding of the facts is a knowledge of the meaning of some of the technical rate terminology employed in the decisions. In *Grain and Grain Products,* 164 I.C.C. 619, 633 (1930), (footnote continued)

and order of the Commission were entered, after hearing, in response to a complaint filed by the Board of Trade with the Commission on April 9, 1973. By order entered February 17, 1976, the Commission denied petitions of the railroads and others seeking a declaration that the proceedings involved an issue of general transportation importance.

The orders of the Commission were reviewed by the United States Court of Appeals for the Eighth Circuit, which found (p. 1191, RR Pet. p. a-10):

(footnote continued)

the Commission defined various methods of ratemaking as follows:

> There are three different bases of rates available on wheat to and from the primary markets, namely, (1) combination of flat rates in and out; (2) combination of flat rates in and proportional or reshipping rates out; and (3) overhead rates with transit. These and other rate descriptive terms used herein may be defined as follows:
>
> A flat rate is either a local rate of a single carrier or a joint rate of two or more carriers published as a unit and not dependent for application on any previous or subsequent transportation.
>
> A proportional rate is a local or joint rate dependent for application upon (1) a previous transportion to the point from which the proportional rate applies; (2) a subsequent transportation from the point to which the proportional rate applies: (3) or both. It is supposed to be a part of a through rate and is usually lower than the flat rate between the same points.
>
> * * *
>
> A reshipping rate is the same thing as a proportional rate.
>
> An ex-lake rate is a proportional rate, applicable from lower lake ports to the East on shipments previously transported across the Great Lakes.

Likewise ex-rail, ex-barge, and ex-truck traffic means traffic brought to the proportional rate point (Chicago in this case) by rail, barge, or truck.

> . . . we agree with the Commission that the rates here under attack are discriminatory as a matter of law under 49 U.S.C. §2.

The grain rates from Illinois to the east and within the east are exceedingly complex. They consist essentially of a basic adjustment which has been in effect for many years but which has, in the last ten years or so particularly, become so overlaid with numerous individual rate adjustments which have completely changed the character of grain rates in eastern territory that there is now no such thing as "a grain-rate structure" in the east. The basic rate adjustment dates from April 1907. The history of these rates has been described in detail in *Grain Rates in Central Freight Association Territory,* 28 I.C.C. 549, 555-557 (1913); *Peoria Board of Trade* v. *A., T., & S. F. Ry. Co.,* 55 I.C.C. 442, 44, 45 (1919); *Grain and Grain Products,* 164 I.C.C. 619, 668-669 (1930); *Grain and Grain Products,* 205 I.C.C. 301, 380-382 (1934); *Grain and Grain Products,* 215 I.C.C. 83, 103-105 (1936); *Cooperative Grain League Fed. Exc.* v. *Akron, C. & Y. R. Co.,* 323 I.C.C. 174, 179-182 (1964).

At the outset, the rates from Illinois to the east consisted of overhead joint one-factor rates in which both the western lines and the eastern lines joined. There were also in effect from Chicago to the east reshipping or proportional rates, which were equal to the divisions which the eastern lines took out of the joint overhead rates for their service east of Chicago. The reshipping or proportional rates were applicable on grain brought to Chicago by lake or by barge and also by rail from points west of Illinois from which there were no joint overhead rates.[3]

[3] The all-rail joint overhead rates via Chicago have since been cancelled. Wheat arriving at Chicago by rail moving to the east moves on proportional rates the same as ex-lake and ex-barge wheat.

While there has always been much grain moved by lake to Chicago, the barge movement was insignificant up to 1933, when the Illinois Waterway was opened. From that time on, large amounts of grain began to move by barge over the Illinois Waterway to Chicago. None of this grain moved on rates subject to regulation by the ICC until 1940. All of it, however, was entitled to engage the rail reshipping or proportional rates from Chicago to the east.

Because of this great increase in the unregulated barge movement to Chicago, the eastern railroads initiated proceedings to restrict the proportional rates so that they would not apply on ex-barge grain, although they would continue to apply on ex-lake, and ex-rail grain. The Commission upheld this restriction in *Grain Proportionals, Ex-Barge to Official Territory,* 248 I.C.C. 307 (1941).[4]

The action of the Commission in approving the restriction of the proportional rates against ex-barge traffic was upheld by this court in *Interstate Commerce Comm'n.* v. *Inland Waterways Corp.,* 319 U.S. 671 (1943).

In further proceedings the Commission again approved the restriction but prescribed special proportional rates on ex-barge traffic higher than those on ex-rail and ex-lake traffic. *Grain Proportionals, Ex-Barge to Official Territory,* 262 I.C.C. 7 (1945). This time, however, this court reversed the Commission in *Interstate Commerce Comm'n.* v. *Mechling,* 330 U.S. 567 (1947), with a finding that such

[4] Commissioner Eastman dissented in part, expressing views which later became the law by virtue of the decision of this court in *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567 (1947). His opinion contains an excellent discussion of the development of reshipping and proportional rates and the application of section 2 to such rates. He also foresaw the problem which would arise in connection with ex-truck rates. 248 I.C.C. at 323-324.

a restriction against ex-barge traffic violated section 2 of the Act.

Following the decision in *Mechling,* the rail carriers restored the application of the proportional rates to ex-barge grain, the same as on ex-rail and ex-lake grain, and that provision has remained substantially the same up to the present time.[5]

Proceedings before the Commission

Count II of the Board of Trade's complaint alleged that the restriction of the reshipping or proportional rates against ex-truck traffic was unlawful in violation of sections 2 and 3(1) of the Act.

After a hearing on the Board of Trade's complaint, the administrative law judge (ALJ) issued an initial decision (RR Pet., App. D). After reciting the history of the rates, the ALJ discussed at length the decisions in *Mechling* and *James McWilliams Blue Line* v. *United States,* 100 F. Supp. 66 (1951), affirmed per curiam in *Interstate Commerce Commission* v. *James McWilliams Blue Line,* 342 U.S. 951 (1952), and found that the factual situation here presented could not be distinguished from the *Blue Line*

[5] The tariff item in question, paragraph (a) of item 520 series of the eastern grain-rate tariff covering the application of the reshipping or proportional rates from Chicago, specifies (RR Pet., p. a-4):

> Rates apply as re-shipping or proportional rates applicable on traffic reaching the reshipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point. Rates also apply on through billed shipments not stopped in transit at re-shipping points subject to this application.

This is the provision found by the Commission and the Court of Appeals to be discriminatory against ex-truck traffic in violation of section 2 of the Act.

and *Mechling* cases. He further found that all wheat, ex-rail, ex-lake, ex-barge, and ex-truck goes into the same elevators; that it loses its identity as far as mode of transportation is concerned; that the issue is not a matter of physical transportation, but of the application of the inbound billing; that it makes no difference to the outbound railroad how the wheat arrived; that switching billing is common and is permitted by the rail tariffs; that the service of the eastern railroads is exactly the same whether the inbound movement was by rail, water, or truck and costs the same; and that the restriction has inhibited and damaged the shippers in the conduct of their businesses of buying and selling wheat and wheat products and in the shipping thereof. He ordered the railroad defendants to remove the discrimination. In view of his finding under section 2, he did not consider the section 1 and section 3(1) issues (RR Pet., pp. a-25-30).

At this point, several western railroads (operating from the west into Chicago), who were not named as defendants, sought and were permitted leave to intervene. Three shippers also sought and were granted leave to intervene. None of them is a party to the court proceedings. Thereafter another shipper (also not a party to the court proceedings) sought and was granted leave to intervene. The American Bakers Association, The Board of Trade of Kansas City, Missouri, Inc., and Anheuser-Busch, Inc., petitioners here, never sought leave to intervene in the Commission proceeding and they were not parties to that proceeding. They were, however, permitted to intervene in support of the railroad petitioners in the court below.

The Commission adopted the initial decision of the ALJ (RR Pet. App. C). The court of Appeals affirmed (RR Pet. App. A).

ARGUMENT

I.
THE PETITIONS HEREIN PRESENT NO SUBSTANTIAL QUESTIONS WARRANTING REVIEW.

A. The alleged disruption of the rate structure does not present a substantial question for review.

Assuming, *arguendo,* that a disruption of the wheat-rate structure would occur, that presents no substantial question for review by this court. Every change in rates is *pro tanto* a disruption of the theretofore prevailing rate structure. This is no ground for preventing such changes. Nor is it any ground for review of such changes by this court, no matter how important the particular rate structure may be. Predictions of dire consequences from such changes are common, but often, as here, they are chimerical and illusory. When and if such issues should arise, the Commission has power to keep them in bounds. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, 507, 509 (1935).

Certainly the fact that a *pro tanto* disruption of a rate structure might occur has never been held to be a reason for the maintenance of unlawful rates. This point was specifically considered and ruled on in the only way possible by the District Court in *Blue Line,* 100 F. Supp at 70-71. The Court of Appeals also considered this same argument and properly ruled adversely to petitioners (p. 1191, n. 9, RR Pet., p. a-11).

Petitioners' assertions that it is undisputed that a serious disruption of the rate structure will result from the decision herein are not correct. The Board of Trade strongly disputes such assertions. All the petitioners are fond of quoting the famous remark of the Commission in *Grain and Grain Products,* 164 I.C.C. 697 (1930), likening the

rates on wheat to a huge blanket covering the country, a pull on any part of which would be felt in every other part of the country. But that was 47 years ago and the eastern grain-rate structure today bears little resemblance to what it was in 1930. Whatever monolithic characteristics the grain-rate structure may have had in 1930 (seventeen years before *Mechling*) are long since gone. The intense competition between rail, lake, barge, and motor carriers, the *Mechling* decision itself, the opening of the Saint Lawrence Seaway, and the advent of multiple-car, unit-train, annual volume, and drastically reduced special export rates has changed all that. In fact to even refer to "a wheat-rate structure" or "a grain-rate structure" is a misnomer. There is no such thing. There is only a melange of various rate adjustments and individual rates.

Furthermore no serious disruption of rates is likely to occur; certainly it need not occur. The railroads, if they choose, can comply with the order in the same manner as they did in the *Mechling* case, by making the proportional rates applicable on ex-truck grain the same as on ex-rail, ex-lake, and ex-barge grain. That would be the normal way of complying with the order, which would cause little, if any, disruption of rates. If, instead, the railroads choose to comply with the order by cancelling all proportional rates, the time to consider those issues is when they arise. The Commission was not faced with those issues in this case, and it would have been improper for the Commission to conjure up issues which were not presented. If the railroads, in the future, attempt to seriously disrupt the rates, purporting to rely on compliance with the order in this case as justification therefor, all shippers and receivers, including those who are petitioners here, will have full opportunity to be heard by the Commission, and the Commission has full authority to keep such rate changes within bounds.

Finally, if the petitioners other than the railroads are so concerned about disruption of the rate structure, why did they not take part in the Commission proceeding? The American Bakers Association, Anheuser-Busch, and The Kansas City Board of Trade, did not seek to become parties to the Commission proceedings, although they all had full knowledge of its existence.[6]

The Commission and the Court of Appeals have given due consideration to the public interest and have obviously reached the right result.

B. The alleged misinterpretation of Mechling and Blue Line does not present a substantial question for review.

The administrative law judge, the Commission, and the Court of Appeals all held, without dissent, that the restriction of the proportional rates against ex-truck traffic violates section 2 of the Act. In so holding all of them agree that the case is governed by the holdings of this court in *Mechling* and *Blue Line,* the factual situation here being indistinguishable from those there presented.

In *Mechling* this court held that the rail proportional rates from Chicago to the east which applied on ex-rail and ex-lake grain but not on ex-barge grain, discriminated against barge traffic in violation of section 2. Some of the ex-barge grain involved in that case was subject to regulation by the I.C.C. and some was not, but the court made

[6] The Kansas City Board of Trade indicates (Pet., p. 8) that it and Anheuser-Busch and others "requested" the Commission to reconsider its refusal to grant review. Those petitioners and several others named were not parties to the Commission proceeding and had no standing therein. Their "requests," which were in violation of the Commission's rules, were prompted by the threat of the eastern railroads to cancel all proportional rates. The petitions for reconsideration filed by those parties who were interveners were denied by the Commission's order of February 17, 1977.

no distinction between unregulated and regulated traffic, and the decision of the lower court in *Blue Line,* affirmed per curiam by this court, specifically held that the principles established in *Mechling* applied equally where all the ex-barge traffic was unregulated.[7] The application of those principles in the case of ex-truck traffic naturally follows.

Section 2 of the Act prohibits the railroads from charging one person more than another for (1) a like and contemporaneous service in the transportation of (2) a like kind of traffic (3) under substantially similar circumstances and conditions.

That all those elements are present here is clearly demonstrated by the findings of the ALJ, referred to *supra,* pp. 8-9. The ex-truck wheat is exactly the same as ex-rail, ex-barge, or ex-lake and the service of the railroads east of Chicago is exactly the same no matter by what mode of transportation the wheat arrived at Chicago. It is settled construction that the circumstances and conditions referred to in section 2 are those relating to the transportation or carriage and not to circumstances arising before or after such transportation. *Wight* v. *United States,* 167 U.S. 512, 518 (1897); *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.,* 220 U.S. 235, 253-254 (1911); *Seaboard Air Line Railway Co.* v. *United States,* 254 U.S. 57, 61-62 (1920); *Atchison, T. & S. F. R. Co.* v. *United States,* 279 U.S. 768 (1929).

There can be no doubt but what the Commission and the Court of Appeals correctly interpreted the decisions in *Mechling* and *Blue Line* and, applying the principles of those cases to the facts here, correctly found that the rates involved are unduly discriminatory in violation of section 2.

[7] The applicable tariff item resulting from *Mechling* made no distinction between regulated and unregulated water traffic. See *supra,* p. 8, n. 5.

The petitioners attempt to avoid the force of *Mechling* and *Blue Line* by arguing that those cases involved "through routes" while the present case does not. This argument has no basis in either fact or law and presents no substantial question warranting review by this court for a number of reasons.

First, the Court of Appeals correctly found that this argument "is beside the point." (P. 1191, RR Pet., p. a-10). It is well settled that, even though proportional rates are parts of through rates (i.e., combinations of locals and proportionals), they are independent, separately established rates, and they must independently meet the standards of lawfulness provided by the Act. *Great Northern R. Co.* v. *Sullivan,* 194 U.S. 458, 462 (1935), *Cairo Board of Trade* v. *C., C., C. & St. L. Ry. Co.,* 46 I.C.C. 343, 350-351 (1917); *Phoenix Utility Co.* v. *Southern Ry. Co.,* 173 I.C.C. 500, 503-504 (1931); *Refund Provisions, Lake Cargo Coal,* 299 I.C.C. 659 (1957).

As this court said in *Atchison, T., & S. F. R. Co.* v. *United States,* 279 U.S. 768, 775-776 (1929):

> We have no occasion to consider the issue of fact whether there was in existence when the Santa Fe filed its proposed tariff a through route from Dodge City via the Southern from Kansas City; nor need we consider the issue of law whether, if there was such a route in existence, the Commission would have been powerless, by reason of ¶4 of §15, to prevent the Santa Fe's withdrawal from it. For we are of opinion that, although the Santa Fe brought the grain into Kansas City, there is nothing in the situation which precluded the Commission from canceling the Santa Fe's proposed tariff as being unreasonable.

Second, there is nothing in the *Mechling* opinion which supports petitioners' arguments in any way. The court did not suggest that it even considered whether any through routes were in existence, and it based its opinion

squarely on section 2 of the Act. 330 U.S. at 576-577. Furthermore, *Mechling* could not possibly have rested on any such ground as petitioners suggest because, in the proceeding which led up to *Mechling,* the Commission had specifically declined to order joint routes and rates. *Grain Proportionals, Ex-Barge to Official Territory,* 262 I.C.C. 7, 32 (1945).

Third, as the ALJ found (RR Pet. p. d-29-30), which finding the Commission adopted, there is no factual basis for differentiating between ex-rail, ex-lake, ex-barge, and ex-truck wheat. Petitioners have never suggested any factual basis for their argument. They simply assert that ex-rail, ex-lake, and ex-barge traffic moves on through routes, but ex-truck traffic does not.[8] This is apparently on the theory that, because the proportional rates presently apply on ex-rail, ex-lake, and ex-barge wheat, that traffic moves on through routes, but, because such rates do not presently apply on ex-truck wheat, that traffic does not move on through routes. This puts the cart before the horse and amounts to no more than saying that whether the proportional rates are discriminatory depends on the willingness of the railroads to voluntarily apply them. This argument is even more absurd in the case of ex-barge traffic, where the proportional rates apply only because this court found the restriction against barge traffic to be in violation of section 2.

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[8] "Through routes" is a technical term used in the Act (e.g. §§ 1(4), 15(3), 15(14), and 307(d)), although it is often used in a general non-technical sense. On the other hand "through traffic," "through movement," "through shipment," "through transportation," are non-technical terms not used in the Act. They generally mean only that the traffic has moved via more than one carrier. "Through route" is not synonymous with any of those terms, although petitioners attempt to create the impression that these terms, all of which they use without definition, are interchangeable.

Fourth, the mere fact that section 307(d) of the Act, added by the Transportation Act of 1940, conferred on the Commission the power to establish joint rail-barge routes in certain cases has nothing to do with the situation. The Commission has never attempted to exercise the power with respect to grain and, in any event, the Commission's power to establish joint barge-rail rates does not extend to traffic which is not subject to I.C.C. regulation. All of the ex-lake traffic from the turn of the century to today has always been unregulated. Barge traffic was unregulated up to 1940. From 1940 to 1973, barge grain traffic was exempt from regulation unless it was handled in "mixed tows," and since 1973 it has been totally exempt even when handled in mixed tows.[9]

We know of no case—and petitioners have cited none—where the Commission has found that a combination of a regulated rail movement with an exempt barge, lake, or motor movement has created a through route as defined by the Commission.[10] In fact, it would appear that by definition such a situation could not exist. If there were a

[9] Under section 303(b) of the Act, 49 U.S.C. §903(b), as it read at the time of *Mechling,* grain was exempt when the cargo space of the vessel (a tow in the case of barges) was used for the carrying of not more than three bulk commodities. Under that provision the barge lines had the option of handling the grain as either an exempt or a regulated commodity, whichever served their purpose in the circumstances. Nearly all grain, however, was in fact handled as an exempt commodity. Effective December 27, 1973, by P.L. 93-207, 87 Stat. 838, bulk commodities were made exempt from regulation, whether or not more than three such commodities were handled in a single vessel.

[10] Yet rail proportional rates in connection with such movements are common. See *supra,* p. 4.

common arrangement for a through route within the meaning of *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.,* 226 I.C.C. 7, 17, then it would necessarily follow that the entire transportation would be subject to regulation under part I of the Act, 49 U.S.C. §1(1)(a).[11]

Finally, nothing in the Act suggests that ex-rail, ex-lake, and ex-barge traffic are to receive a preference over ex-truck traffic. On the contrary, the national transportation policy (49 U.S.C. Prec. §1) directs the Commission to provide for "fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each."

We submit that petitioners' contentions that the Commission and Court of Appeals misinterpreted *Mechling* and *Blue Line* have no substance whatever.

II.

THERE IS NO CONFLICT IN DECISIONS WARRANTING REVIEW BY THIS COURT.

Petitioners allege that the decision below is in conflict with *Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U. S. 671 (1943). On this point the Court of Appeals said (p. 1191, RR Pet. pp. a-10-11):

> We do not view *Inland Waterways* as being inconsistent with *Mechling* and *Blue Line.* In that case the petitioners focused more on the origin of the grain as the basis of the discrimination than on the mode of transportation into Chicago. Both the Commission

[11] See *Chicago, B & Q. R. Co.* v. *Chicago & E. I. R. Co.,* 322 I.C.C. 138 (1964) for an example of such a case, where a lake carrier and a railroad voluntarily published a joint through rate on coal over a joint through rail-lake route, although the lake portion of the move, standing alone, would have been exempt from regulation.

and the Supreme Court stated that their holdings did not connote approval of the rates, but only that petitioners' assertions could not be sustained. In any event, to the extent that *Inland Waterways* is inconsistent with *Mechling* and *Blue Line,* we are bound by the Supreme Court's latest pronouncements as reflected in the latter.

Whether one thinks there is a conflict between this case and *Inland Waterways* and, if so, to what extent, depends on what one thinks was decided in *Inland Waterways.* The *result* in *Inland Waterways* was to permit the railroads to continue to restrict their proportonal rates against application on ex-barge traffic while permitting their application on ex-lake and ex-rail traffic. The court, however, never specifically addressed that issue, and it specifically disclaimed approval of the rates. 319 U.S. at 691. Rather the court was more concerned with the barge lines' argument (319 U.S. at 683) that—

> [T]o deny the ex-barge grain the benefit of proportionals sought to be cancelled was necessarily unlawful since the physical carriage beyond Chicago was substantially the same no matter where the grain originated.

With respect thereto the court observed (319 U.S. at 684):

> As the Commission correctly observed with reference to the first contention, 'to adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned.'

Finally, after making it clear that its opinion did not constitute approval of the specific rates involved, the court, in referring to the Commission's ultimate finding

that the schedules were shown to be just and reasonable, said (p. 686):

> Read in the context, we think it meant only that the proposed schedules could not be struck down upon the erroneous view advanced by the protestants. The finding of the Commission that the proposed schedules 'are not shown to be otherwise unlawful' is, we think, to be similarly read. This form of finding has been held by the Commission not to constitute an approval or a prescription of the rates under suspension.

Petitioners would read *Inland Waterways* as specifically approving the right of railroads to make application of their proportional rates dependent on the *mode* of transportation to Chicago. We do not so read *Inland Waterways,* but if it can be so construed, then such holding was clearly overruled by *Mechling* and *Blue Line,* both of which specifically held that, under section 2 of the Act, no such distinction could be made.[12]

Petitioners would distinguish *Mechling* from *Inland Waterways* also by reason of the passage of the Transportation Act of 1940, giving the Commission the power to establish joint rail-water but not rail-motor rates and routes. This is simply another version of the "through route" argument. There is no substance to that argument

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[12] Insofar as differences in rail proportional rates for the same service result from differences in the origin or destination of the non-rail haul, such differences are still recognized as proper. In *Refund Provisions, Lake Cargo Coal, supra,* the Commission held, and quite properly so, that it did not construe *Mechling* or *Blue Line* to prevent proportional rates "which may vary depending upon the origin or destination of the traffic". 299 I.C.C. at 662.

for reasons which have previously been stated (*supra,* pp. 13-17).[13]

CONCLUSION

For reasons above stated, we submit that the petitions here set forth no substantial questions of law for review by this court and that the decision below was correct in all respects. The petitions should be denied.

Respectfully submitted,

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[13] A somewhat similar argument is made by petitioner American Bakers Association which argues (Pet., pp. 20-22) that the decision here conflicts with section 6(11)(b) of the Act. This issue was not raised before the Commission or in the court below. It is a sufficient answer to this argument to note that the proportional rates here involved were not fixed under section 6(11)(b) so no question could possibly arise in this case as to any such conflict. Nor do we see how it could ever arise. The decision here was based on section 2. Both section 2 and section 6(11)(b) have co-existed for many years, although in *Mechling,* this court struck down special ex-barge proportional rates on the basis that they were discriminatory to ex-barge traffic under section 2 of the Act. In any event, whatever power the Commission may have under section 6(11)(b) is not affected in the slightest by the decision here.